

Before the
Administrative Hearing Commission
State of Missouri



COURTNEY BUFFKINS,

Petitioner,

vs.

MISSOURI BOARD OF PHARMACY,

Respondent.

No. 13-0473 PH

DECISION

Courtney Buffkins (“Buffkins”) shall be placed on the Employment Disqualification List (“EDL”) for a period of five years because he misappropriated controlled substances belonging to his employer.

Procedure

On February 20, 2013, the Missouri Board of Pharmacy (the “Board”) issued a decision placing Buffkins’ name on the EDL for a period of five years. On March 21, 2013, Buffkins filed a complaint appealing the decision. The Board filed an answer to the complaint on April 18, 2013. We held a hearing on the complaint on July 2, 2013. Buffkins appeared *pro se*. Joshua L. Hill, of Newman, Conley, & Ruth, P.C., represented the Board. Buffkins failed to respond to the Board’s First Request for Admissions, served on him on May 23, 2013. At the hearing, without objection from Buffkins, we granted the Board’s motion to deem the request

admitted. The case became ready for decision on November 6, 2013, when the last post-hearing brief was due.

Findings of Fact

1. Buffkins is registered by the Board as a pharmacy technician. His registration is and was at all relevant times current and active.

2. On January 10, 2010, Buffkins began working as a “floater pharmacist” at two locations of Walgreen’s Pharmacy in Olivette and University City, in St. Louis County, Missouri.

3. Walgreen’s uses cameras to monitor its pharmacy employees at work, and maintains records of its pharmacists’ distribution of all medications, including controlled substances.

4. On October 15, 2012, Walgreen’s pharmacist-in-charge advised the Board that Buffkins’ employment had been terminated for stealing Alprazolam and two strengths of Viagra. The Board responded by sending its inspector to perform an investigation at both Walgreen’s locations where Buffkins had worked.

5. Alprazolam is a Schedule IV controlled substance. Viagra is available by prescription only.

6. During a random controlled substance audit of the Olivette and University City Walgreen’s Pharmacy locations for the period July 23, 2012 to October 16, 2012, the Board’s inspector found losses of Alprazolam, as well as other medications.

7. The Board’s inspector also received copies of Walgreen’s Item Movement Reports for Viagra 100 mg and 50 mg tablets, which showed a negative adjustment for Viagra 100 mg of three tablets and a negative adjustment of Viagra 50 mg of five tablets.

8. At the University City pharmacy, a shortage of twelve Alprazolam tablets was unaccounted for on October 13, 2012.

9. On that date, Buffkins worked at the University City pharmacy and was observed removing Alprazolam tablets from the shelf. The pharmacy did not have any record of filling Alprazolam prescriptions that day.

10. The University City pharmacy found a shortage of ten Alprazolam tablets on October 14, 2012.

11. Buffkins worked at the University City pharmacy that day, and was observed removing Alprazolam tablets from the shelf. The pharmacy had no record of filling Alprazolam prescriptions on October 14, 2012.

12. On October 15, 2012, Walgreen's loss prevention supervisor interviewed Buffkins and obtained a written statement from him. In the statement, Buffkins admitted taking "Alprazolam, 2 milligrams, total of roughly (60-95); Alprazolam, .25 milligrams, (6-10); and Viagra's 50, sometimes 100 milligrams of Viagra's, total on there will be about (20-30)" from the pharmacy. Buffkins signed each page of the three-page statement immediately beneath the following words, "This is a true and accurate statement of the facts."

13. Buffkins further admitted in his written statement that he would fold the stolen tablets into a receipt, and tape them to a cup to remove them from the pharmacy. He admitted to trading the Alprazolam tablets he removed from the pharmacy on the street in exchange for EBT cards.

14. At the time he removed the medications from the pharmacy, Buffkins did not have a prescription for Alprazolam or Viagra.

15. Buffkins did not pay Walgreen's for any of the tablets he removed from the pharmacy.

16. After investigating the circumstances of Buffkins' dismissal from Walgreen's, the Board sent Buffkins a pharmacy technician disqualification notification letter on February 12, 2013, placing his name on the EDL for a period of five years.

17. At the hearing, Buffkins testified that the signed, written statement he gave to Walgreen's was entirely false and made under duress. He further testified that he did not misappropriate any medications from Walgreen's.

Conclusions of Law

We have jurisdiction to hear the complaint. § 338.013.8.¹ The Board has the burden of proving that Buffkins committed an act for which the law allows his name to be placed on the EDL. *See Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

Section 338.013.7 states:

The board may place on the employment disqualification list the name of a pharmacy technician who has been adjudicated and found guilty, or has entered a plea of guilty or nolo contendere, of a violation of any state, territory or federal drug law, or to any felony *or has violated any provision of subsection 2 of section 338.055.*

(Emphasis added.)

The Board argues Buffkins was appropriately placed on the EDL because he violated § 338.055.2(5), (6), (13), and (15):

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

* * *

(5) Incompetence, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter;

¹ Statutory references are to the RSMo Supp. 2012, unless otherwise indicated.

(6) Violation of, or assisting any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter;

* * *

(13) Violation of any professional trust or confidence;

* * *

(15) Violation of the drug laws or rules and regulations of the state, any other state or the federal government[.]

Credibility of Witnesses

The Board's case largely relies on Buffkins' admissions, and his signed, hand-written statement, which provided a detailed account of how he illegally diverted medications from Walgreen's pharmacy.² At the hearing, Buffkins recanted his statement, and asserted that information in the statement was not true, but was provided to him by Walgreen's loss prevention manager. He claimed his statement was made under duress, and that he was under treatment for depression at the time.

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). Buffkins had several opportunities to fully explain why he admitted misconduct that he now says never occurred. We observed his demeanor, and looked closely at the other evidence presented in this case. Ultimately, we were not persuaded by Buffkins' testimony. While we are not convinced that he was solely responsible for all the medication shortages reflected in the audit of Walgreen's drug inventory, a preponderance of the evidence establishes that, on at least two occasions in October, 2012, Buffkins removed Alprazolam and Viagra from the pharmacy, and sold or exchanged them for his personal benefit.

² Buffkins was the Board's sole witness.

Statutory Violations - § 338.055.2(5), (6), (13), and (15)

Section 338.013.7 authorizes the Board to place a licensee's name on the EDL for any violation of § 338.055.2. In this case, the Board produced substantial evidence that Buffkins violated § 338.055.2(5), (6), (13), and (15).

A. § 338.055.2(5) – Incompetence, Misconduct, Gross Negligence, Fraud, Misrepresentation, or Dishonesty in Performance of Professional Functions

Incompetence is a general lack of, or a lack of disposition to use, a professional ability. *Johnson v. Missouri Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 642 (Mo. App., W.D. 2004); *Forbes v. Missouri Real Estate Comm'n*, 798 S.W.2d 227, 230 (Mo. App., W.D. 1990). We follow the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg'n for the Healing Arts*, 293 S.W.3d 423 (Mo. banc 2009). Incompetency is a "state of being." *Id.* at 435. The disciplinary statute does not state that licensees may be subject to discipline for "incompetent" acts, but for "incompetence." Although a licensee may be guilty of repeated instances of gross negligence and other violations of the standards of practice, that is not necessarily sufficient to establish incompetency unless the acts flowed from the licensee's incompetence--that is, being unable or unwilling to function properly as a pharmacy technician.

As a pharmacy technician, Buffkins worked in a closely monitored environment, and was entrusted with the job of handling strictly regulated controlled substances under the direct supervision of a pharmacist. At least twice, Buffkins illegally diverted controlled substances and non-controlled prescription medications from the pharmacy without authorization, an act that may only be construed as an unwillingness to function properly as a pharmacy technician.³ We find his conduct incompetent.

³ According to Buffkins' written statement, his theft of medications began in August 2012, and involved taking a few tablets on several different dates.

Misconduct is defined as “the willful doing of an act with a wrongful intention[:] intentional wrongdoing.” *Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm’n Nov. 15, 1985) at 125, *aff’d*, 744 S.W.2d 524 (Mo. App., E.D. 1988). We may infer the requisite mental state from the conduct of the licensee “in light of all surrounding circumstances.” *Duncan*, 744 S.W.2d at 533. Buffkins admitted a deliberate scheme to surreptitiously remove medications from the pharmacy. He acted willfully, with knowledge that his actions violated Walgreen’s policy and the drug laws governing the dispensation of controlled substances. We find misconduct.

Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty. *Id.* The Board presented no expert evidence about the standard of care applicable to pharmacy technicians. Although such evidence has been determined to be necessary in some instances to establish gross negligence, the applicable standard of care here is apparent from the very definition of the practice of pharmacy in § 338.010.1:

The "practice of pharmacy" means the interpretation, implementation, and evaluation of medical prescription orders, including any legend drugs under 21 U.S.C. Section 353; receipt, transmission, or handling of such orders or facilitating the dispensing of such orders; the designing, initiating, implementing, and monitoring of a medication therapeutic plan *as defined by the prescription order so long as the prescription order is specific to each patient* for care by a pharmacist; the compounding, dispensing, labeling, and administration of drugs and devices *pursuant to medical prescription orders*[.]

(Emphasis added.) See *State Bd. of Reg’n for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 158 n. 16 (Mo. 2003); *Tendai v. Missouri State Bd. of Reg’n for the Healing Arts*, 161 S.W.3d 358, 367 (Mo. 2005), overruled on other grounds by *Albanna v. State Bd. of Reg’n for the*

Healing Arts, 293 S.W.3d 423, 435 (Mo. 2009); *Kerwin v. Missouri Dental Board*, 375 S.W.3d 219 (Mo.App. W.D.2012).

Buffkins consciously disregarded his professional duty to dispense medication in accordance with a prescription when he removed Alprazolam and Viagra tablets without authority, and then distributed them to others. We find him grossly negligent.

Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him. *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910). It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004). Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit. *Id.* at 794 (11th ed. 2004). In an environment where employees were under close surveillance, and drug inventory carefully monitored, Buffkins managed to find a way to discretely remove medications without detection so he could then sell them. His actions were dishonest, fraudulent, and designed to deceive his employer. We find fraud, dishonesty, and misrepresentation.

Buffkins is subject to placement on the EDL for violating § 338.055.2(5).

*B. § 338.055.2(6) – Violation of Chapter 338 or
any Lawful Rule or Regulation Thereunder*

A licensee who violates any provision of Chapter 338, or any lawful rule or regulation adopted pursuant to that chapter, is subject to placement on the EDL. § 338.055.2(6). The Board contends that by removing prescription drugs from the pharmacy without a prescription, Buffkins violated 20 CSR 2220-2.018(1):

To be valid for purposes of dispensing, a prescription shall conform to all requirements of sections 338.056 or 338.196, RSMo, and shall contain the following information:

- (A) The date of prescribing;
- (B) The name of the patient(s)[;]
- (C) The prescriber's name[;]
- (D) Name, strength and dosage of drug...and the directions for use;
- (E) The number of refills, if applicable;
- (F) The quantity prescribed in weight, volume, or number of units;
- (G) An indication of whether generic substitution has been authorized by the prescriber[;]
- (H) Any change or alteration made to the prescription dispensed based on contact with the prescriber to show a clear audit trail[;]
- (I) The address of the prescriber and the patient when the prescription is for a controlled substance;
- (J) The prescriber's Drug Enforcement Administration (DEA) number when the prescription is for a controlled substance; and
- (K) Controlled substance prescriptions shall also comply with all requirements of federal and state controlled substance laws.

This regulation, promulgated under Chapter 338, specifies requirements for a valid prescription; it does not prohibit the dispensation of medications without a prescription. As Buffkins had no prescription for the medications he diverted from Walgreen's, we find this regulation inapplicable.

C. § 338.055.2(13) – Violation of Professional Trust or Confidence

The Board contends Buffkins' placement on the EDL is required under § 338.055.2(13) because he violated a professional trust or confidence. The phrase "professional trust or confidence" is not defined in Chapter 335, nor has the phrase been defined in the case law. Absent a statutory definition, the plain meaning of words used in a statute, as found in the dictionary, is typically relied on. *E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011). The dictionary definition of "professional" is

of, relating to, or characteristic of a profession or calling...[;]... engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency...[; and]...characterized or conforming to the technical or ethical standards of a profession or occupation....

WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1811 (1986). “Trust” is

assured reliance on some person or thing [;] a confident dependence on the character, ability, strength, or truth of someone or something...[.]

Id. at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]” *Id.* at 2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.* Therefore, we define professional trust or confidence to mean reliance on the special knowledge and skills that professional licensure evidences. It may exist not only between the professional and his clients, but also between the professional and his employer and colleagues. *See Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo App. E.D., 1989).

Buffkins’ employer had a reasonable expectation that he could be trusted to uphold federal and state drug laws and Walgreen’s policies governing the administration and dispensing of prescription medications. When he stole medications from the pharmacy, Buffkins violated that professional trust and confidence. We find Buffkins’ conduct violated § 338.055.2(13).

D. § 338.055.2(15) – Violation of Drug Laws and Regulations

As further grounds for placing Buffkins on the EDL, the Board cites his violation of §§ 195.202.1 and 195.204.1, Missouri drug laws.

Section 195.202.1 provides:

Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.

Although he had no valid authorization or prescription, Buffkins removed Alprazolam, a controlled substance, from Walgreen's pharmacy. His possession of the medication was, therefore, a violation of § 195.202.1.

Section 195.204.1, RSMo 2000, provides:

A person commits the offense of fraudulently attempting to obtain a controlled substance if he obtains or attempts to obtain a controlled substance or procures or attempts to procure the administration of the controlled substance by fraud, deceit, misrepresentation, or subterfuge[.]

As we noted above, Buffkins employed fraud, deceit, and subterfuge to remove Alprazolam from the pharmacy without detection. His conduct violated § 195.204.1.

Summary

We place Courtney Buffkins' name on the EDL for a period of five years for violating § 338.055.2(5), (6), (13), and (15).

SO ORDERED on December 4, 2013.

\s\ Mary E. Nelson
MARY E. NELSON
Commissioner